No. 84-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President and DON PENSION, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICUS CURIAE CITY OF DETROIT

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CONSENT OF THE PARTIES

Petitioners and Respondents consented to the filing of this Brief. Their letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE CITY OF DETROIT

The City of Detroit, on whose behalf this brief is filed, is a municipality whose law enforcement agencies, particularly its Police Department, have worked hard to overcome past discrimination against minorities and women, and the debilitating effects that discrimination has had on the ability of the police to operate.

The interest of the City of Detroit stems primarily from the fact that it has instituted an affirmative action plan in its Police Department which has governed promotions in the Department since the plan was adopted in 1974. Detroit's race-conscious promotion program has thus far withstood two separate challenges under the Equal Protection clause and federal civil rights laws, *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), on remand, 36 FEP Cases, 1019 (E.D. Mich. 1984), appeal pending (6th Cir. No. 85-1120) (sustaining race-conscious promotions to the rank of sergeant); *Baker v. City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), modified, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 703 (1984) (sustaining race-conscious promotions to the rank of lieutenant). In these cases, Detroit's race conscious promotion program has thus far been sustained after lengthy trial proceedings based upon voluminous trial records including comprehensive proofs by the City of Detroit of the circumstances warranting utilization of race-conscious measures. The case now before the Court presents the same constitutional question posed in Detroit's litigation—the constitutionality of race-conscious affirmative action measures in public employment—but without a record reflecting the circumstances which engendered the use of race-conscious measures by the Jackson Board of Education.

Also, since 1977, the Department has consistently urged the union representing Detroit's police officers to agree to a modification of inverse seniority—similar to the provision at issue here—so that minority and female representation would not be reduced through layoffs. The police union has withheld agreement asserting *inter alia* that such a provision would be unlawful and unconstitutional. Ironically, a district court has held the City of Detroit violated the Constitution, after the police union refused

the requested modification, by making police layoffs in 1979 and 1980 as dictated by the governing inverse seniority provision which the court specifically found to be *bona fide*, *NAACP v. DPOA*, 591 F. Supp. 1194 (E.D. Mich. 1984), appeal pending (6th Cir. No. 85-1126).[1]

Finally, the City of Detroit has pursued race-conscious measures in hiring in its Fire Department. Like the promotion measures in the Police Department, the race-conscious hiring program in the Fire Department survived challenge under federal civil rights laws and the Constitution after full trial and development of a comprehensive evidentiary record reflecting the program's purpose and justification, *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984).

As set forth below, the City of Detroit believes the constitutionality of race-conscious affirmative action in public employment can be determined only on a case-by-case basis with a view to the particular facts presented. The present record is manifestly inadequate for such a determination. The writ of *certiorari* should be dismissed as occurred in *Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981).

SUMMARY OF ARGUMENT

At issue is the constitutionality of a provision in the collective bargaining agreement between the Jackson Board of Education (hereafter "JBE" or "the Board") and the Jackson Education Association (hereafter "JEA"). Under the provision, minority representation among JBE's teachers is to be preserved in connection with layoffs.

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[1] Though disagreeing that it violated the Constitution by not unilaterally abrogating the inverse seniority provision, the City of Detroit nevertheless continues to contend that its proposed minority retention provision was lawful and constitutional as part of a remedy for past discrimination.

While this Court has not addressed the constitutionality of race-conscious affirmative action in public employment, a majority of the Justices have agreed that public entities may use race conscious measures where warranted in aid of a sufficiently compelling government interest and where such measures are appropriately-tailored to serve such an interest. Lower courts, based on these decisions, have uniformly held that use of race-conscious affirmative action measures in public employment is constitutional where appropriately-tailored to serve a sufficient governmental interest. Section I, *infra*.

A school board seeking to eliminate unconstitutional segregation of public schools and to root out the effects of such segregation presents the strongest case for use of race-conscious corrective measures. This Court has held that school boards owe an "affirmative obligation" to undo all of the effects of school segregation. It has repeatedly held not only that judicial decrees may appropriately take account of the race of public school students and teachers but also that state laws and court orders which purport to preclude the remedial consideration of race themselves deny equal protection. Not only are school boards *competent* to make determinations of the need to take race into account; *they are under a duty to do so.* Section II, *infra.*

The present case brought by white teachers against JBE was resolved in the trial court on cross motions for summary judgment. The record here is devoid of information reflecting JBE's justification for the race-conscious, minority retention provision. In fact, the records of prior, related cases suggest that JBE and the teachers union settled upon the challenged provision in the belief that such a provision was a necessary part of disestablishing a segregated school system. The constitutional issue here cannot appropriately be resolved based on the record of this case which is devoid of information regarding the historical justification for the challenged provision and the in-

tentions and objectives of the Jackson Board of Education in connection with establishing and maintaining that provision. On analysis, Petitioners' position in this Court relies on mere assertions regarding the purpose of the provision which are absolutely without foundation in the record and upon an extraordinary proffer of extra-record documents. While these documents are claimed to reflect pertinent labor market statistics, they cannot be accepted as dispositive when presented first at this level.

As was done in *Minnick*, *supra*, the writ of certiorari should be dismissed.

ARGUMENT

I. UNDER APPROPRIATE CIRCUMSTANCES RACE-CONSCIOUS AFFIRMATIVE ACTION WITHSTANDS CHALLENGE UNDER THE FOURTEENTH AMENDMENT AND TITLE VII.

This Court has previously held that, under appropriate circumstances, race-conscious affirmative action will withstand "strict scrutiny" under the Fourteenth Amendment, *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); and also survives challenge under Title VII, *United Steelworkers v. Weber*, 443 U.S. 193 (1979).[2]

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[2] The United States contends that the Sixth Circuit and the concurring opinion by Justice Brennan in *Bakke*, 438 U.S. at 324, have applied a test of "intermediate" or "permissive" scrutiny for race conscious affirmative action. Brief for the United States as Amicus Curiae, 10-24. To the contrary, no member of this Court nor the Sixth Circuit has taken the position that race-conscious affirmative action by governmental entities is to be tested under a standard more relaxed than "strict scrutiny". As stated by Justice Brennan in *Bakke*:

> our review under the Fourteenth Amendment should be strict—not '"strict" in theory and fatal in fact,' because it is stigma that causes fatality—but *strict and searching nonetheless.*
>
> 438 U.S. at 361-362 (Brennan, J. concurring in the judgment in part and dissenting in part).

This Court has not yet addressed the permissibility of race-conscious affirmative action in public employment.[3]

The City of Detroit has pursued race-conscious affirmative action in promotions to the ranks of police sergeant and lieutenant. Its program has withstood two separate challenges under the equal protection clause and federal rights laws, *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), on remand, 36 FEP Cases 1019 (E.D.Mich. 1984), appeal pending (6th Cir. No. 85-1120) (sustaining race-conscious promotions to the rank of sergeant); *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D.Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 703 (sustaining race-conscious promotions to the rank of lieutenant). Both cases were resolved based on voluminous trial records containing comprehensive proofs by the City of Detroit of the circumstances which led the Detroit Board of Police Commissioners to adopt race-conscious measures. These circumstances included the Department's history of discrimination against black officers and citizens and the Department's need for increased minority representation at all levels of police employment in order effectively to police the City of Detroit. In these and other cases, the determination

[3] In *Weber*, the Court stated that this question was not posed, 443 U.S. at 200. The issue was posed in *Minnick v. California Dept. of Corrections*, 452 U.S. 105, 120 n. 28 (1981); however, *certiorari* was dismissed, among other things, because of ambiguities in the record concerning the extent to which race or sex had been used as a factor in making promotions and also the justification for such use, *id.* at 123-127; as set forth below, the record here is similarly inadequate.

In *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576, 2590 (1984), the Court stated it was not passing upon affirmative action programs which were adopted voluntarily by public employers.

of the appropriateness of race-conscious affirmative action has necessarily rested upon the "particular facts", *Bratton, supra*, 704 F.2d at 883. "What is or is not a 'reasonable' use of race will vary with the circumstances surrounding the need for, urgency and operation of a given plan." *Id.* at 887, n. 31.

Whether race-conscious affirmative action survives constitutional scrutiny in a given case thus requires a factual determination of the sufficiency of the governmental interest in implementing such a program and whether the particular program is properly tailored to the circumstances presented. The Sixth Circuit in *Bratton* explained the test as follows:

> A direct showing of past intentional discrimination is not required to establish the existence of this [governmental] interest . . . . It is sufficient if findings are made by a body with the competence to act in this area and a review of those findings reveals 'a sound basis for concluding that minority underrepresentation is substantial, and that the handicap of past discrimination is impeding access . . . of minorities.' . . .
>
> Once the governmental interest in some remedial action is thus established, we must proceed to determine whether the remedial measures employed are reasonable. This includes an examination of whether any discrete group or individual is stigmatized by the program and whether racial classifications have been reasonably used in light of the program's objectives. *Regents of the University of California v. Bakke*, 438 U.S. at 372-76, 98 S.Ct. at 2790-92; *Fullilove v. Klutznick*, 448 U.S. at 518-19, 100 S.Ct. at 2795. If the affirmative action plan satisfies these criteria, it does not violate the equal protection clause of the Fourteenth Amendment.

Bratton, supra, 704 F.2d at 886-87. See also *DPOA v. Young, supra*, 608 F.2d at 694.

The test, as explained in *Bratton*, is supported by the views previously expressed by a majority of the members of this Court in *Bakke* and *Fullilove*.[4] Thus, the permissibility of race-conscious affirmative action in appropriate circumstances is not seriously in dispute. The question is whether appropriate circumstances to justify such action exist in a particular case.

II. THE EQUAL PROTECTION CLAUSE UPHOLDS USE OF RACE-CONSCIOUS MEASURES BY SCHOOL BOARDS IN ORDER TO ELIMINATE PERCEIVED SCHOOL SEGREGATION AND ITS EFFECTS.

No stronger case can be made for the sustaining of race-conscious measures than where such measures are utilized by a school board—as appears to have been the case here, Section III, *infra*—as part of efforts to eliminate unconstitutional segregation of public schools.

In *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), the Supreme Court held the operation of racially-segregated school systems violative of the Fourteenth Amendment. The next year in *Brown v. Board of Education*, 349 U.S. 294 (1955) (Brown II), the Court held such dual systems *must be abolished*. The Court declared that school board operating such systems were *required* "to effectuate a transition to a racially nondiscriminatory school system." 349 U.S. at 301.

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[4] Support for the use of this test based upon the views of at least five members of this Court in *Bakke*, is suggested by the Court's Opinion in *Minnick*, 452 U.S. at 115, n. 17. Indeed, it is notable, that only one member of the present Court, Justice Rehnquist, subscribed to the view expressed by Justice Stewart that race-conscious affirmative action could not withstand constitutional scrutiny in appropriate circumstances. (Justice Rehnquist, concurring in *Minnick*, 452 U.S. at 127, stated that but for his view that the lower court's judgment was not "final", he would have joined Justice Stewart's dissent, *id.* at 128.)

In *Green v. County School Bd.*, 391 U.S. 430, 437-438 (1967), the Court declared that a school board operating a dual system is

> clearly charged with the *affirmative duty* to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.
>
> (Emphasis added).

The affirmative duty extends to desegregation of faculty and staff as well as of students and requires affirmative hiring efforts where needed to accord black students the right to an integrated education. In *United States v. Montgomery Bd. of Ed.*, 395 U.S. 225 (1969), this court took up an issue of faculty and staff desegregation, a "goal" that it had previously "recognized to be an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." 395 U.S. at 232, citing *Bradley v. School Board of City of Richmond*, 382 U.S. 103 (1965) and *Rogers v. Paul*, 382 U.S. 198 (1965). In that case, the Court upheld, as a reasonable step toward desegregation, a district court order requiring that at each school there be placed a minimum number of teachers whose race was different from that of the majority of students at the school.

In *Swann v. Charlotte Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971), the Court stressed again the responsibility of school authorities to eliminate segregation. It explained that the broad equity powers of federal courts arise in "default by the school authorities of *their obligation* to proffer acceptable remedies . . . ." *Id.* at 16 (emphasis added). The Court in *Swann* held not only that race may be taken into account by a federal court in devising a suitable remedy for segregation but is also properly considered by school boards *even apart from* discharging their affirmative obligations to abolish unconstitutional desegregation. Chief Justice Burger stated:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.*
>
> (Emphasis added).

In a companion case, *North Carolina State Bd. of Ed. v. Swann*, 402 U.S. 43 (1971), the Court considered a state law forbidding student assignments which take account of race. The Chief Justice stated:

> the flat prohibition against assignment of students for purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. . . . An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit commands of *Green v. County School Board* . . . that all *reasonable methods be available to formulate an effective remedy.*
>
> 402 U.S. at 46 (emphasis added).

In another compansion case, *McDaniel v. Barresi*, 402 U.S. 39 (1971), the Court reviewed a state court order enjoining the operation of a voluntary program to desegregate public schools involving race-conscious student assignments. The Chief Justice stated as follows:

> The Clarke County Board of Education, as part of its affirmative duty to disestablish the dual school system, properly took into account the race of its elementary school children in drawing attendance lines. To have done otherwise would have severely hampered the board's ability to deal effectively with the task at hand. School boards that operated dual

> school systems are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.' . . . . In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.' . . . Any other approach would freeze the status quo that is the very target of all desegregation processes.
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> 402 U.S. at 41.

In *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 200 n. 11 (1973), the court reaffirmed that the "affirmative duty" declared in *Green* "to take whatever steps might be necessary" "remains the governing principle". The Court specifically rejected the notion urged by Justice Rehnquist's lone dissent that the "affirmative duty to integrate of *Brown II*" was only a "'prohibition against discrimination' 'in the sense that the assignment of a child to a particular school is not made to depend on his race. . . .'" In *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449 (1979), the Court declared that "[e]ach instance of a failure or refusal to fulfill [the] affirmative duty (declared in *Green*] continues the violation of the Fourteenth Amendment." 443 U.S. at 459.

Thus, it is clear that the Fourteenth Amendment *not only allows but requires* school boards operating unconstitutionally segregated systems to take all reasonable steps to bring about an integrated system. Such cases as *North Carolina v. Swann* and *McDaniel v. Barresi* make plain that equal protection is denied, not by a school board's initiation of race-conscious, corrective action, but *inter alia* by state laws and court orders which purport to stand in the way of appropriate consideration of race.

Where a school board's operation of an unconstitutionally segregated system has included a history of discrimination in teacher hiring, provision for retention of

minority teachers in the event of layoffs is appropriate race-conscious relief and has been upheld where imposed by judicial decree, *Morgan v. O'Bryant*, 671 F.2d 23, 27-28 (1st Cir. 1982); *Arthur v. Nyquist*, 712 F.2d 816, 822-24 (2nd Cir. 1983), *cert. denied, sub. nom. Buffalo Teachers v. Arthur*, —— U.S. ——, 104 S.Ct. 3555. In *Morgan*, based on findings of unconstitutional school desegregation including discrimination in faculty hiring, the District Court ordered the Boston public schools to engage in affirmative hiring of black faculty on a one-for-one basis. When increasing representation of black faculty was threatened by a budget crisis, the District Court, overriding inverse seniority, required the layoffs be conducted so as to maintain the existing percentage of black teachers. The First Circuit in *Morgan* upheld the minority retention decree as a proper equitable remedy for the black school children who had been victims of unconstitutional discrimination. The First Circuit stated:

> It has been recognized from the beginning that the victims here are the black school children, not the possible hiring discriminatees. . . . The orders are thus designed insofar as possible, to make the school children whole. Proof of individual hiring discrimination is irrelevant. The employment cases cited by appellants are inapposite to this issue.
>
> 671 F.2d at 27.

Similarly, in *Arthur* the Second Circuit sustained a minority retention decree declaring the District Court ". . . had the authority to curtail the seniority rights of the Federation's membership in order to vindicate the constitutional rights of the minority children in the Buffalo school system." 712 F.2d at 822, n.5.[5]

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[5] At the same time, the Second Circuit was cognizant of the interests of majority teachers. In one respect, it found the District Court's Order "needlessly harsh" and directed that "majority" excessed teachers be placed on preferred eligibility lists so as to be given first chance according to their seniority for such temporary or permanent positions as become available, 712 F.2d at 823.

The justification for the minority retention decrees approved in *Morgan* and *Arthur* is firmly rooted in *Brown I* and decisions of this Court holding a desegregated faculty to be an essential ingredient of a desegregated system. If courts could decree the overriding of *bona fide* seniority provisions in order to preserve minority teacher representation, *a fortiori* a school board's compliance with its affirmative obligation to eradicate segregation may include *agreement* with the teachers' collective bargaining representative for an analogous measure.

School boards are undoubtedly competent to make determinations regarding the need for race-conscious measures to eliminate school segregation. The posture of a school board taking steps to eliminate unconstitutional segregation is totally different from that of the California Board of Regents as described by Justice Powell in *Bakke*, see 438 U.S. at 309. In attempting to equate the two, the United States cites *Brown I* (Brief of United States as *amicus curiae*, 4, 32) but ignores the litany of this Court's ensuing school desegregation decisions which have made corrective action, including race-conscious corrective action, a matter of constitutional duty. Quite clearly, this Court did not intend to impose an affirmative obligation which school boards are not competent to perform. Notably, the Sixth Circuit in *Bratton v. City of Detroit*, 704 F.2d at 888, n.33, decisively rejected a parallel attack on the competence of the Detroit Board of Police Commissioners to determine the need for race-conscious promotion measures.

As set forth below, the record of this case, though sparse, is suggestive that the Jackson Board of Education bargained for the minority retention provision at issue as part of a comprehensive program to eliminate what it colorably perceived as an unconstitutionally segregated school system.

III. THE PRESENT RECORD IS NOT ADEQUATE TO PASS UPON THE JUSTIFICATION FOR THE CHALLENGED MEASURE.

Resolution of the constitutional issue posed in this case is hampered by the fact that, in the District Court, both parties to this litigation thought the issue could be resolved through summary judgment without a factual record regarding the circumstances which engendered the measure challenged. As detailed below, JBE's summary judgment brief described the challenged provision's inception as part of efforts by JBE to eliminate segregation of the Jackson schools.[6] Rather than countering the recitations in JBE's brief, Petitioners *agreed they had no dispute on the facts.* Given the peculiar manner in which Petitioners agreed the case could be resolved, the District Court properly entered judgment for JBE and the Sixth Circuit properly affirmed.

Tellingly, Petitioners—Plaintiffs below—now not only acknowledge but proclaim the inadequacy of the record in this matter. Along with their Brief on the merits (which, itself includes several tables setting forth extra-record facts and statistics), they have filed an extraordi-

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[6] The transcript of the summary judgment argument before District Judge Joiner of February 23, 1982 (not reproduced in the Joint Appendix) reflects the parties' recitations that they had "no dispute on the facts . . . ." (Tr. February 23, 1982, 6).

The record contains summary judgment motions filed respectively by the Plaintiffs and JBE both of which are largely unsupported by factual proffer. The record contains a total of three affidavits, none of which addresses the justification, or lack thereof, for the challenged provision: (1) Affidavit of Plaintiff Susan Diebold re Minority Teachers Seniority with teacher seniority list as of March 1, 1981 (J.A. 54-100); (2) Affidavit of Plaintiff's counsel Thomas Rasmussen re Interpretation re Seniority List (J.A. 101); (3) Affidavit of JBE personnel operations coordinator Jane I. Phelps (not included in Joint Appendix). The Phelps Affidavit includes some historical information regarding minority faculty hiring and representation and regarding representation of blacks in the school population.

nary submission entitled "Petitioners' Lodging" setting forth 21 separate items of assertedly pertinent evidence, none of which was even alluded to by them in the District Court or the Court of Appeals.[7] Petitioners' documentary proffer amounts to a request that this Court conduct an original trial proceeding based on voluminous evidence whose absence was specifically noted in the lower court. The Petition for Writ of Certiorari, which this Court granted, surely contained no hint that Petitioners would present voluminous extra-record material and effectively ask this Court to conduct an original proceeding in order to reach the constitutional issue which Petitioners posed.

Although not included in the record here, several items of evidence in two related cases involving the provision at issue do support the recitations in JBE's summary judgment brief.[8] That evidence suggests circumstances

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[7] Notably, Judge Wellford in concurrence below stated that had Plaintiffs presented data as to the percentage of qualified minority teachers in the relevant labor market to show that the Board's hiring of black teachers over a number of years had equalled that figure, he believed the Court of Appeals might well have been required to reverse the District Court's judgment. 746 F.2d at 1160.

[8] Decisions by federal District Judge Robert E. DeMascio in *Jackson Education Association v. Board of Education* (E.D. Mich. 1977) (*Jackson I*), and by Jackson County Circuit Judge Gordon W. Britten in *Jackson Education Association v. Board of Education* (Jackson County Circuit Court, 1979) (*Jackson II*), are included in the Joint Appendix (J.A. 30, *et seq.* and 39, *et seq.*). Notably, the two cases were brought by the Jackson Education Association and black teachers when JBE refused to follow the minority retention provision in making layoffs in 1974 and instead laid off according to inverse seniority (J.A. 43).

Judge DeMascio's Opinion refers to a deposition by a former school official, Dr. Lawrence Read, who was Superintendent of Schools when the challenged provision originated; to trial testimony by the Executive Director of the Jackson Education Association, Kirk Curtis; and to 15 exhibits which were admitted into evidence along with the Read deposition testimony (J.A. 34). While this

analogous in numerous respects to those proven in the Detroit litigation in which the Detroit Police Department's race-conscious promotion program was sustained.

JBE's summary judgment brief recites that the challenged minority retention provision originated as part of actions by the Jackson Board of Education to desegregate Jackson's public schools in 1972.[9] The brief recites that Jackson's public schools were historically segregated. With support from the Affidavit of Jane I. Phelps, the brief recites that between 1950 and 1953, the Jackson schools engaged in extensive teacher hiring—*189 new teachers were hired in those years, all of whom were white.* In 1953-54, when an additional 61 teachers were hired, the Jackson school system hired its *first* black teacher. Hiring of black teachers proceeded slowly through the balance of the 1950's and the bulk of the 1960's. As of 1969 when black students made up 15.2% of the total student population, black representation on the faculty was only 3.9%. JBE summary judgment brief, 1; Affidavit of Jane Phelps.

JBE's summary judgment brief further recites, albeit without record support, that Jackson's high schools had been desegregated in 1962; that its junior high schools had been desegregated in 1969; but that its elementary schools remained segregated through 1972, the year when

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and other evidence would have a vital bearing on the permissibility of the challenged provision under the equal protection clause, none of it is included in the record of this case.

We understand Respondent will submit certified copies of the records in the two *Jackson Education Association* cases to this Court and references thereto are made in this Brief to support our contentions that the record is not adequate for resolution of the important constitutional issue which is posed.

[9] Petitioners' repeated assertions that this is not a case involving school desegregation (Petitioners Br. 11, 34) are not supported by the limited record here and appear contrary to the actual facts.

the minority retention provision was adopted.[10] JBE's summary judgment brief states that complaints regarding the continued segregation of the elementary schools and asserted discrimination by the Board in staff hiring and placement were filed with the Michigan Civil Rights Commission by the Jackson NAACP and recites that "efforts to integrate the elementary schools and to set up increased minority hiring were prompted, in part, by these complaints" (JBE Summary Judgment Brief, 1).[11]

JBE's summary judgment brief refers to the formation of various committees to study the problems of school segregation including the shortage of black teachers in Jackson. It refers to reports and recommendations made at various times between 1969 and 1972 by these committees and also by the school system's minority affairs office. For example, the JBE summary judgment brief recites that the Citizens Schools Advisory Committee "studied all aspects of integration including teacher hiring and training", JBE summary judgment Brief, 2.[12]

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[10] The Read Deposition, which was received in evidence by Judge DeMascio, includes testimony regarding desegregation of the high schools in 1962 and junior high schools in 1969 (Read Dep., 6-7). The continuing racial isolation of black elementary school students and teachers—what few there were—is reflected in the various exhibits received by Judge DeMascio as detailed below.

[11] We are apprised that these complaints and ensuing investigatory reports and other documentation are matters of record with the Michigan Commission. They were not included in the record here nor in the record of the two prior related proceedings. Clearly, however, they would provide pertinent evidence regarding the information before the Jackson Board of Education when it bargained for the challenged provision.

[12] Some, though by no means all, of the pertinent reports are among the trial exhibits received by Judge DeMascio (J.A. 34). For example, the October 9, 1969 report of the Professional Staff Ad Hoc Committee, referred to at p. 1 of JBE's summary judgment brief, was received in evidence as Exhibit 1 in the trial before Judge DeMascio. A report by the racial subcommittee of the Citizens Schools' Advisory Committee of May 11, 1970, apparently re-

JBE's summary judgment brief recites that the inverse seniority provision in the collective bargaining agreement up to 1972 was a hindrance to successful recruitment of minority teachers. Testimony regarding these matters appeared in the deposition of Dr. Read, 24, and in the trial testimony of JEA Executive Director Curtis (*Jackson I* Tr. 16-20). This testimony reflects agreement between the school superintendent and the union leader that the minority retention provision was necessary for successful recruitment of qualified minority teachers so as to cure the Jackson schools' chronic shortage of minority teachers. They testified that economic circumstances and decreasing student enrollment made layoffs likely and discouraged qualified black teachers from accepting employment in Jackson. JEA executive Director Curtis testified that the minority retention provision was "certainly" "necessary to correct the past problems" of segregation in the Jackson system and that "if we didn't do some modifications in the seniority system, we certainly weren't going to achieve the goals we were talking about before." (*Jackson I* Tr. 41-43). Dr. Read's testimony was to the same effect (Read Dep. 65-69).

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ferred to at p. 2 of JBE's summary judgment brief, was received as Exhibit 2. Recommendations of the school system's Minority Affairs Office of November 18, 1971 also referred to at p. 2 of JBE summary judgment brief, were received as Exhibit 4. The January 27, 1972 questionnaire disseminated by the Minority Affairs Office to all teachers in the system referred to at p. 3 of JBE's summary brief was received as Exhibit 6.

Notably, pertinent testimony explaining the circumstances which led some 96% of the teachers to express preference, in their questionnaire answers, for straight seniority was the subject of testimony by JEA's Executive Director. This testimony appears in the transcript of the trial before Judge DeMascio, *Jackson I* Tr. 25. As noted above, that trial transcript is not part of the record here.

The recommendation by the Citizens Advisory Committee of February 17, 1972 that all elementary schools be desegregated as of the fall of 1972 and that the Board attempt to balance faculty representation was received as Exhibit 8.

Dr. Read perceived that the shortage of minority teachers was the result of past discrimination in teacher hiring. His perception, though not fully explored, was made clear in the deposition. For example, Read testified that he had been told that the Jackson schools had previously had a policy of not hiring blacks; specifically he stated that "an administrator in the Flint Public Schools . . . told me she had tried to get a position in Jackson in the early 1950's and was told that they didn't hire colored people." Read affirmed that this was the "type of thing" that he and the school system's minority affairs office were addressing in approaching the problem of desegregation (Read Dep., 22-23).

JBE's summary judgment brief refers to an occurrence in 1972 described as "a violent 'racially motivated explosion at Jackson High School probably the worst we have had', which featured fighting and rioting among the students." JBE summary judgment brief, 4. In fact, the quotation is from the Read Deposition which includes additional information regarding the February 1972 incident (Read Dep. 36-37). The trial testimony of JEA Executive Director Curtis included testimony regarding the February 1972 disturbance and also other incidents involving racial violence in the Jackson schools, *Jackson I* Tr. 31-32.

The body of evidence before Judge DeMascio—which by no means constitutes all of the evidence pertinent to the justification for the minority retention provision and JBE's objectives and intentions in bargaining for it—strongly suggests that the Board's actions in 1972 including bargaining for the challenged minority retention provision were based on a well-founded view that steps fully to desegregate Jackson students and faculty were constitutionally and morally required.[13] Dr. Read, who presided

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[13] Factual development was truncated by Judge DeMascio's instruction that the examination could be "shorten[ed] . . . if it is indicated that there is no evidence going to be offered to oppose the fact that the Board of Education of Jackson had been involved

over Jackson's desegregation efforts as Superintendent of Schools, testified that he had been told by the president of the Jackson NAACP that he had a federal court complaint ready to file should desegregation be postponed or abandoned (Read. Dep., 44). Read testified that other cities in Michigan with black students had already been sued including Kalamazoo, Grand Rapids, Pontiac and Benton Harbor and that these school systems had been placed in a state of turmoil by the desegregation suits (Read Dep., 43). He testified that the Jackson black community was "100% supportive of the desegregation effort" and that they "wanted action" and were suspicious of "vacillation" on the issue (Read Dep., 43).

Most enlightening is a question-and-answer brochure circulated by JBE in the spring of 1972 to explain the reasons for the Board's decision to desegregate the elementary schools effective in the fall of 1972.[14] The brochure included questions such as:

> Why do we have to desegregate our elementary schools?
>
> What about the difference between (de jure) segregation and accidental (de facto) segregation in the schools? Didn't the original Supreme Court decision in 1954 only apply to legal (de jure) segregation?
>
> Why not wait for a court to order the Jackson school district to segregate?

In answer to this last question, the brochure stated as follows:

> Waiting for what appears the inevitable only flames passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated

in the ongoing problem of a segregated system and that they were taking steps to attempt a desegregated system." (Jackson I Tr. 33-34). JBE presented no evidence contrary to that proposition in the prior case just as it presented no evidence in support of it here.

[14] The brochure was received in evidence by Judge DeMascio as Exhibit 8.

> school system. Firmly established legal precedents mandate a change. Many citizens know this to be true.
>
> Waiting for a court order emphasizes to many that we are quite willing to disobey the law until the court orders us not to disobey the law. . . .[15]

Further, the school system's few black teachers were heavily concentrated in the predominantly black schools. While this fact was not clearly indicated in the trial record before Judge DeMascio, published surveys of the Office of Civil Rights of the U.S. Department of Health, Education, and Welfare indicate that as of the fall of 1970, fourteen of Jackson's 22 elementary schools had *no* black teachers. Of Jackson's 15 elementary school teachers at the time, 4 were at heavily-black Helmer and another 4 were at heavily-black McCulloch. Dr. Read testified that just prior to desegregation, there were some schools with five or six black teachers and others with none (Read Dep., 49).

For whatever reason, black students' interest in continued application of the minority retention provision has not been vigorously defended by JBE. The record before Judge DeMascio suggests possible reasons for this. It re-

[15] Further, the brochure recited that many students were already being bused out of their own neighborhoods to seven listed schools which were predominantly white; at the same time the brochure stated that students living close to two heavily-black schools had for years been bused to schools in other neighborhoods (Exhibit 8, answer to question 6).

The racial composition of the nine schools in question is reflected as of 1969-70 on a sheet marked "Exhibit 1" which is part of the May 14, 1970 Report of the Citizens of the Advisory Committee (received as Exhibit 2 by Judge DeMascio). The two heavily-black schools, Helmer and McCulloch, had black representations of 60% and 86% respectively. The seven predominantly white schools had black representations as follows: Ridgeway—0%; Harrington—0%; Sharp Park—5%; Lincoln—24%; Dibble—7%; Blair—5%; and Trumbull—.5%.

flects that the issue of school desegregation had bitterly divided the Jackson community (Read. Dep. 40); that three school board members who supported the desegregation effort were defeated in an election in June 1972 (Jackson I Tr. 44); and that Dr. Read himself was fired as School Superintendent in the fall of 1972 (*id.*) In his deposition, Dr. Read stated that while he had carried out the policies of the preceding Board in spear-heading desegregation, he was terminated because the new Board was philosophically not in sympathy with those efforts (Read Dep., 59-62). Notably, when layoffs became necessary in 1974, the Board declined to follow the minority retention provision (J.A. 43). That action resulted in the prior litigation in which the minority retention provision was upheld and JBE was required to comply with it. Ensuing compliance by JBE triggered the present litigation by individual white teachers in which JBE has failed to produce as evidence any of the matters considered by it in bargaining for the minority retention provision.

Quite plainly, the black public school students who were the victims of Jackson's apparent school segregation have an interest in the defense of the challenged minority retention measure, *Rogers v. Paul, supra*, 382 U.S. at 200 (upholding standing of minority students to challenge school board's alleged policy of racial allocation of teachers). That interest has been less than adequately protected by JBE which in the prior litigation sought to defend its violation of the provision and which has failed to include in this record even the limited evidence supporting the measure which was adduced by the teachers union in the prior case.

The critical constitutional issue which is posed here has far-reaching implications, not only for black students and parents in Jackson but for minority citizens throughout the United States and for governmental entities such as the City of Detroit with longstanding commitments to defense of affirmative action principles. The

constitutional issue posed here should not be adjudicated without a record which reflects the circumstances which in fact engendered the race-conscious measure at issue. In *Bradley v. School Bd. of City of Richmond, supra*, the Court held that parents and students were entitled to full evidentiary hearings on their contentions that faculty allocation on an alleged racial basis was inadequate to bring about a fully desegregated system. The Court held that the lower courts had erred in approving a desegregation plan without allowing such a hearing. Likewise, this Court should not pass upon the constitutional issue posed here without a record reflecting JBE's justification for adoption of the challenged measure.

In this case, the inadequacy of the record militates in favor of dismissal of certiorari just as occurred in *Minnick*. Petitioners bore the burden of producing evidence in the trial court that the challenged provision is not warranted as a remedy for segregation and discrimination as perceived by JBE and JEA. That burden cannot be satisfied by evidence proffered for the first time here. Instead of countering JBE's recitations in the trial court, the petitioners indicated there was no factual dispute. Given the peculiar manner in which petitioners agreed the case could be resolved, the District Court reached the correct result. That same peculiarity, which caused the case to come here without pertinent record materials, makes it an unsuitable vehicle for constitutional adjudication. Certiorari should be dismissed.[16] The constitutional issue posed should await a case presenting an adequate record for its resolution.

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[16] While this case could be remanded for further proceedings, we believe dismissal of certiorari to be the better course. Petitioners have had their day in Court below. Disposition of the case without evidentiary development resulted from their failure to dispute JBE's factual recitations and their representation that the facts were not in dispute. They have no valid claim for a second opportunity to raise factual disputes and present evidence.

CONCLUSION

For the reasons stated, certiorari should be dismissed.

Respectfully submitted,

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